

STAFF REPORT

To: Asheville City Council Date: January 12, 2010

From: Cathy D. Ball, PE, Public Works Director

Via: Gary Jackson, City Manager

Subject: Revised Stormwater and Erosion Control Ordinance

Summary Statement: Staff recommends that City Council adopt the revised Stormwater and Stormwater and Erosion Control Ordinance, including all related sections of the Unified Development Ordinance that impact the Stormwater and Erosion Control Ordinance.

Review: In August 2007, City Council adopted revisions to the Stormwater and Erosion Control Ordinance. Included in their approval, staff was directed to revisit the buffer and inspection requirements as well as the penalty section of the ordinance. Council directed staff to include a broader stakeholder group in this process.

The stakeholder group known as the Watershed Policy Committee (WPC) was increased to include any interested party. We have included a list of these participants along with the organization/interest they represent. This group met regularly for approximately six months every two weeks for four hours. The group continues to meet as the Planning and Zoning Commission has asked for clarifications of the WPC's recommendations and the policies incorporated into the proposed ordinance.

The good news is that there were a number of items that the entire group agreed needed to be changed in the ordinance. A list of these consensus items is attached.

There were three items on which the WPC did not reach consensus regarding buffers, greenways and watershed overlay zones. These items are identified below.

Buffers

The current ordinance requires a thirty foot buffer on all intermittent and perennial streams for *any* land disturbing activity. The state minimum buffer requirement is thirty feet for all land disturbing activity of *one acre or more*.

During the adoption of the current ordinance, City Council expressed concern that the proposed ordinance was a “one size fits all” recommendation. They encouraged staff to evaluate the specific factors that contributed to higher pollutant discharge. After months of fact finding and deliberation, a member of the WPC recommended a conceptual idea of determining the buffer requirement based on the amount of land disturbance, the slope of the adjacent grade and the stream flow. This matrix has come to be known as Pete’s Matrix.

The group researched this matrix and tested it by looking at specific sites in the City to determine the practical impact of the ordinance. The outcome proved to be effective in requiring widths appropriate for high risk sites.

WPC members that had attended over 50% of the meetings voted, the outcome of these votes were to recommend this matrix. That vote was taken in the spring of 2008. The buffer matrix has

continued to be evaluated by staff and has proven to address water quality concerns while balancing staffing and supporting other Council adopted initiatives.

Staff worked over the past two years to balance the engineering data with community needs expressed through the WPC and public meetings. Staff supports Pete's Matrix because it accomplishes and supports all of the following:

- *Preservation of even a narrow strip along stream banks and the deep rooted vegetation with that strip provides significant benefits to the maintenance of stable stream banks.*
- *The first thirty feet is significant in removing sediment loading which is our primary source of water pollution.*
- *The steep slope ordinance limits and discourages development in the higher terrain. Population projections show the need for additional development in the City in the next 15 years.*
- *Pete's Matrix requires larger buffers for properties on steep slopes.*
- *It is more restrictive than the State Minimum. Staff cannot support the State minimum for urbanized areas like Asheville. Per the State's requirement, Pete's Matrix provides buffer protection for intermittent streams.*
- *Staff worked with the WPC in good faith to support the evaluation of all the information available. The majority of the group support a good risk based methodology provided in the recommended Matrix.*

Watershed Overlay Zones

Watershed Overlay Zones, previously referred to as "Critical Resource Zones" are zones that may have additional design standards required by the Stormwater Administrator. The WPC discussion around this issue was on the process that was used to determine or designate a Watershed Overlay Zone. Property rights stakeholders were concerned that the process for designating these areas needed to be clearly defined and not subject to the exclusive will of the Stormwater Administrator.

Environmental concerns centered around allowing flexibility to designate these areas to protect water quality based on the best available data.

For consistence purposes, staff recommends the following definition of Watershed Overlay Zone.

Watershed Overlay Zone - Those areas as listed on the Watershed Overlay Zone Inventory and which is inclusive of all critical areas of water supply watersheds, high quality waters, outstanding resource waters as delineated by the State, and Total Maximum Daily Load (TMDL) reports.

Greenways

The WPC did not specifically address the issue of greenways in the buffer. Following the October 2008 meeting with Planning and Zoning Commission, staff met with the Greenway Commission three times. The greenway commission would like for the ordinance to be explicit in allowing impervious greenways in the buffer.

Staff has consulted with the NC Division of Water Quality (NC DWQ) and understands their position to be that construction of impervious greenways within the buffer violates the City's Phase II NPDES permit. Staff believes that the State will allow the City to approve impervious greenways within the buffer when appropriate mitigation measures are taken. Staff is recommending in the "Table of Uses" that impervious greenways (pervious is already allowed) be allowed in the buffer with mitigation which could include an educational element to the greenway. It should be noted that per the conditions of the City's Phase II NPDES permit, NC DWQ has to approve changes to the City's Stormwater Ordinance. Staff believes, but cannot ensure, that the requirements expressed in the Table of Uses will be approved.

Planning and Zoning:

Staff made presentations regarding the Stormwater and Erosion Control Ordinance to the Planning and Zoning Commission in October 2008, April 2009, August 2009, September 2009 and October 2009. The Planning and Zoning Commission, with a 5 to 1 vote, approved the ordinance on October 22, 2009 with the attached changes labeled *Planning and Zoning Recommendation – October 22, 2009*.

Staff has evaluated the recommendations made by the Planning and Zoning Commission at their October 2009 meeting. While staff interprets the recommendations from the Planning and Zoning Commission to offer the community more flexibility in developing near streams while still provided some water quality protection and greenway planning, staff cannot support Planning and Zoning's recommendations. While P&Z agreed with all of the staff recommend changes, they did not support the buffer matrix. P&Z recommended the State minimum for buffers (thirty feet for developments that disturb one acre or more) but added the additional requirements noted in the attachment. Staff does not feel P&Z's recommendation provides enough water quality protection for our community. The State minimum is the least restrictive requirement for any community in the State.

Consequences of Adopting P&Z Recommendations

A staff analysis of the impacts of various buffer options allows an estimate of the maximum potential impacts of adopting P&Z's recommendation to implement only the State minimum buffer requirements. If the State minimum approach is adopted, Asheville will forego the following approximate stream protection on parcels under one acre:

- 8' buffers - 8.32 miles of stream
- 10' buffers - 20.92 miles of stream
- 15' buffers - 30.02 miles of stream
- 20' buffers - 26.94 miles of stream
- 25' buffers - 6.15 miles of stream
- 30' buffers - 19.6 miles of stream

Staff strongly believes that the miles of stream afforded some level of buffer protection is the most important factor related to control of stream bank erosion, stream degradation through incision, and overall biological integrity of our waterways. These are the factors that most often lead to declaration of "impaired waters," and increase the City's and resident's long-term liability under the Clean Water Act.

On the property owner side, though it is nice to have no regulation, Pete's matrix reduces the potential impact on a property owner when that owner's options are limited due to the size of the parcel. It also encourages property owners to disturb areas that are less steep, an incentive that is in the right direction. Finally, because cumulative impervious area is also considered, it provides a marginal incentive to minimize unnecessary impervious areas. That again, is a step in the right direction.

P&Z made the recommendation for the State minimum for buffers with additional requirements. After careful review, staff provides the following comments regarding P&Z's additional recommendations:

1. Sustainable Development Practices

- a. Require "sustainable building practices" for 1 acre or more
- b. Allow civil engineers to select two approved list of Best Management Practices "BMP"
- c. LEED certified projects qualify as "sustainable building"

Staff response: "Sustainable Building Practices" is not defined in any City of Asheville or State of North Carolina document. The State will not allow the City to make Sustainable Building Practices equal LEED Certification for the purposes of meeting the buffer regulations. The reason for this is that LEED Certification can be obtained without having any water quality measures associated with the project. The NCDWQ Stormwater BMP Manual provides developers/design professionals with various BMP's so they can determine the one that best fits their project.

2. Greenway Trails and Continuous Stream Side Access

- a. Require public greenway easement projects that require 30 foot buffer and are on the Greenway Master Plan.
- b. Allow greenways identified on the Greenways Master Plan by right.

Staff response: The authorities cited in the Stormwater Ordinance do not provide the City with the power to take private property for the purposes of establishing, or preserving space for, greenways. Staff does not believe that the City currently has any legislative authority or policy to allow us to require this easement as a part of complying with the Stormwater and Erosion Control Ordinance.

3. Establish Process and Procedure

- a. Staff develop application, review and permitting procedures that meet items 1 and 2, all of which would be subject to the 3-step appeal process

Staff response: Staff has developed the attached *Citizen's Guide to the Stormwater Ordinance*. Until directed by Council, staff resources will not be expended on development of the process and procedure recommended by P&Z.

Strategic Objectives:

This action complies with Council's Strategic Goals by promoting sustainable, high density, infill growth that makes efficient use of existing resources in addition to reforming and streamlining the development review process.

Pro's

- Approval of the consensus items will improve efficiency and reduce both City and developer cost in the process without sacrificing water quality.
- The Watershed Policy Committee met every two weeks for four hours over a six month period to develop the recommended ordinance. The committee reached consensus on all but three issues.
- The revised ordinance is better organized and easier to follow than the existing ordinance. Staff has developed a "Citizen's Guide to the Stormwater and Erosion Control Ordinance" to assist non-technical customers.
- Adoption of the Staff recommendations will avoid further delay in the implementation of the new ordinance; benefiting the City, landowners, and the environment. Staff will require additional time to analyze the recommendation of the Planning and Zoning Commission due to the complexity of the recommendation. If workable solutions to the issues raised by the P&Z recommendation are found, it will be difficult to negotiate acceptance of the resulting ordinance with NC DWA.

Con's

- The WPC did not reach consensus on the buffers or on the definition of a Watershed Overlay Zone..
- The WPC did not consider and provide a recommendation on allowing impervious greenways in the Aquatic Buffer.
- The Committee struggled with the balance of the amount of buffer required versus the ability to develop land. It was difficult to develop the group beyond a win-loose solution. Pete's Matrix was supported by a majority of the group but was a compromise.

Fiscal Responsibility:

Approval of the consensus items will improve the efficiency of the permitting process. The fiscal impact will result in a more efficient use of City staff as well as the individuals filling the appeals. See repose to question 10 in the Frequently Asked Questions attachment for more specific information.

A sub-committee of the WPC called the Cost/Benefit Analysis committee evaluated other consensus recommendations. In all cases, the implementation of the consensus items improves efficiency without significant adverse impacts to water quality.

Recommendation: Staff recommends that City Council adopt the revised Stormwater and Stormwater and Erosion Control Ordinance, including all related sections of the Unified Development Ordinance that impact the Stormwater and Erosion Control Ordinance.

More specifically, staff asks that Council adopt staff's recommended changes to the Unified Development Ordinance Section 7-12-2 (Stormwater and Erosion Control Ordinance), parts of Section 7-2-5 (Definitions) and parts of Section 7-18-2 (Enforcement).

Attachments:

- (1) Revised Stormwater and Erosion Control Index
- (2) Revised Stormwater and Erosion Control Ordinance

- (3) Revised Stormwater and Erosion Control Definitions
- (4) Pete's Matrix
- (5) Watershed Policy Committee Members
- (6) Consensus Items
- (7) Discussion of Consensus Recommendations for Ordinance and Policy Changes in the Proposed Stormwater Ordinance
- (8) Matrix for Legal Authorities, Excluding Buffers, Greenways and Watershed Overlay Zones
- (9) Citizen's Guide to the Stormwater and Erosion Control Ordinance (without pictures)
- (10) Frequently Asked Questions
- (11) Planning and Zoning Commission Recommendation – October 22, 2009